

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WAYSIDE CARTING, INC.,	:	DETERMINATION
FRANCO ROTONDO AND	:	
JOSEPHINE ROTONDO	:	DTA NO. 808818
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1985	:	
through November 30, 1988.	:	

Petitioners, Wayside Carting, Inc., Franco Rotondo and Josephine Rotondo, 25 Conifer Court, Northport, New York 11768, filed a joint petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1985 through November 30, 1988.

A hearing was commenced before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York on September 14, 1992 at 1:15 P.M. and continued to completion on February 3, 1993 at 10:45 A.M. Petitioners filed a brief on April 8, 1993. After an extension of time was granted, the brief of the Division of Taxation became due on June 2, 1993. No brief was filed, and at petitioners' request, the record was closed by the Administrative Law Judge on June 22, 1993, which began the six-month statutory period for issuance of a determination. Petitioners appeared by Robert Plautz, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation made a clear and unequivocal request for the books and records of Wayside Carting, Inc. for the entire period of the proposed assessment before resorting to an indirect method of determining sales taxes due.

II. Whether it was unreasonable for the Division of Taxation to rely on information supplied by third parties to estimate receipts not subject to sales tax.

III. Whether petitioner Josephine Rotondo was a person required to collect sales and use taxes on behalf of Wayside Carting, Inc. pursuant to Tax Law §§ 1131(1) and 1133(a) for all of the periods in issue.

IV. Whether petitioners have established that any failure by Wayside Carting, Inc. to comply with the Tax Law was due to reasonable cause and not to willful neglect thereby justifying the cancellation of penalties.

V. Whether petitioner Josephine Rotondo should be awarded \$1,500.00 on the ground that she was denied due process and equal protection of law by the Division of Taxation.

VI. Whether the petitions of Wayside Carting, Inc. and Josephine Rotondo should be dismissed on the ground that a valid petition was never filed by either or, alternatively, whether default determinations should be issued to either on the ground that they failed to appear at hearing.

FINDINGS OF FACT

The Division of Taxation ("Division") issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated August 30, 1989, to petitioner Wayside Carting, Inc. ("Wayside"), assessing sales tax in the amount of \$177,086.86 for the period September 1, 1985 to November 30, 1988, plus penalty and interest. A second notice of determination, also dated August 30, 1989, was issued to Wayside assessing penalties in the amount of \$17,708.69 for the period September 1, 1985 through November 30, 1988.

Notices of determination and demands for payment of sales and use taxes due, dated August 30, 1989, were also issued to petitioners Franco Rotondo and Josephine Rotondo, as officers of Wayside, assessing identical amounts of tax, penalty and interest against each as was assessed against the corporation.

Petitioners filed one consolidated petition with the Division of Tax Appeals challenging the six notices of determination issued to the three petitioners. The petition was signed by

Stewart Buxbaum, C.P.A., as petitioners' representative. It was accompanied by three powers of attorney, appointing Mr. Buxbaum to represent Wayside, Mr. Rotondo and Mrs. Rotondo, respectively. The powers of attorney from Wayside to Mr. Buxbaum and from Mrs. Rotondo to Mr. Buxbaum bear what appears to be the signature of Josephine Rotondo; however, the testimony of Mr. and Mrs. Rotondo establishes that Mr. Rotondo signed Mrs. Rotondo's name to the powers of attorney, with her permission.

Wayside was in the business of hauling garbage, waste and construction debris. The assessments issued against petitioners resulted from a sales tax field audit of Wayside which commenced in July 1988. In a letter to Wayside dated July 10, 1988, the Division stated:

"Your New York State Sales and Use tax returns have been scheduled for a field examination at your office on the date and time shown above.

"All books and records pertaining to your Sales Tax Liability for the period under audit should be available on the appointment date. This would include journals, ledgers, sales invoices, purchase invoices, cash register tapes, federal income tax returns, and exemption certificates. Exemption certificates not made available may be disallowed in which case you will be held liable for the tax on the transaction."

The period under audit was identified at the top of the letter as "9/1/85 - 8/31/88".

Attached to the appointment letter is a checklist entitled "RECORDS REQUESTED FOR SALES TAX AUDIT". The audit period is identified on the checklist as September 1, 1985 through August 31, 1987. The checklist requested a number of items for that period. Sales, purchase and expense invoices, plus guest checks and register tapes were requested only for the year 1987. The auditor also made repeated oral requests for books and records.

Wayside's accountant, Vito LaMonica, represented Wayside on audit. The corporation's books and records were made available to the auditor at his offices. The Division was furnished with Wayside's general ledger, Federal income tax returns with depreciation schedules, State sales tax returns and tax-exempt certificates. The auditor's checklist of records available during audit indicates that all the exemption certificates provided were for exempt organizations and that no resale certificates or capital improvement certificates were provided.

On its sales tax returns, Wayside reported gross sales and taxable sales in equal amounts, indicating that it had no nontaxable sales. The auditor compared gross sales posted in

Wayside's general ledger for the period September 1, 1985 through November 31, 1988 to taxable sales reported on Wayside's sales tax returns for the same period and found a discrepancy in the amount of \$3,108,061.90. The general ledger did not segregate receipts into taxable and nontaxable sales and petitioners did not provide the auditor with any other records, such as a sales journal or invoices, which would have enabled her to determine which receipts were subject to sales tax and which were not.

Mr. LaMonica claimed that Wayside had a substantial amount of nontaxable sales. He provided the auditor with a file folder containing tax exemption certificates from various customers, but, inasmuch as no invoices or records of individual sales were maintained, the auditor could not associate any individual sale with a tax exempt certificate.

Since it appeared to the auditor that at least a portion of Wayside's gross sales were not subject to sales tax, she allowed Wayside to substantiate its nontaxable sales through verification from its customers. Mr. LaMonica sent a letter to the Village of Northport asking it to verify payments made to Wayside for the period June 1986 through June 1989. He sent a letter to Huntington Union Free School District asking them to provide a list of payments made to Wayside for the period March 1, 1988 through May 31, 1988.

The auditor testified that Mr. LaMonica sent confirmation letters to other customers from whom Wayside had received a tax-exempt certificate; however, other evidence in the record contradicts that testimony. The auditor's handwritten log documents her activities on this audit. An entry for October 28, 1988 indicates that she adapted a previously used confirmation letter to fit Wayside and, using the tax-exempt certificates to obtain names, prepared a list of Wayside's customers. An entry for November 7, 1988 states: "Sent out confirmation of amts purchased from Wayside to resale & exempt orgs for 3/1/88 - 5/31/88." The confirmation letters placed in evidence bear the auditor's name and signature. Petitioner placed in evidence seven confirmation letters which apparently were returned to the Division by Wayside's customers with responses to the questions asked. Some of those letters have a handwritten entry on them consisting only of a dollar figure. For example, a confirmation letter addressed to

Oyster Bay View Estates Ltd. has the notation "\$810" on the bottom of the page. The Division placed in evidence a workpaper which lists the name of each Wayside customer who responded to the confirmation letter, the amount of each customer's purchases for the test period and the customer's tax exempt number where verified.

The record suggests that Wayside's nontaxable sales fell into two broad general categories: sales to tax-exempt organizations or entities, such as municipal governments, and sales of trash removal services to contractors who used those services in the course of performing capital improvements or demolishing buildings. The extent to which the auditor considered sales in the latter category is uncertain. The auditor sent third-party confirmation letters to several parties whose names indicate that they may have been construction contractors (e.g., Andrews Construction Corporation and Sasto Remodeling Ltd.). In addition, the December 5, 1988 entry in the auditor's handwritten log states: "Went over case with Charlie -- didn't accept contractor resale certif --." Among the vendors who replied to the Division's inquiries were F.J.G. Bldg. Corp., S.E.M. Development and Amma Construction Co. Their purchases from Wayside were treated as nontaxable sales.

Information provided by Wayside's customers was used by the auditor to estimate Wayside's nontaxable sales. The Village of Northport reported purchasing services from Wayside in the total amount of \$822,997.88 for the years 1986, 1987 and 1988. Accordingly, the auditor subtracted this amount from unsubstantiated nontaxable sales in the amount of \$3,108,061.90, yielding unsubstantiated nontaxable sales for the audit period of \$2,285,064.02.

The auditor received responses from 19 Wayside customers reporting total purchases of \$120,916.64 for the test period, March 1, 1988 through May 31, 1988. Among the respondents were the Village of Northport, reporting sales during the test period of \$83,902.03 and the Huntington Union Free School District reporting purchases of \$5,543.76 for the test period. Since the purchases of the Village of Northport had already been subtracted from Wayside's sales, the amount it reported for the test period was eliminated from the auditor's calculation of a nontaxable percentage. For the test period, the auditor was able to substantiate nontaxable

sales (in addition to those made to the Village of Northport) of \$37,014.61. She divided this amount by total claimed nontaxable sales for the test period of \$184,354.59 to calculate a nontaxable sales percentage of 20.08. She applied this percentage to unsubstantiated nontaxable sales of \$2,285,064.02 to estimate nontaxable sales for the audit period of \$456,840.86. This amount was subtracted from unsubstantiated nontaxable sales, yielding disallowed nontaxable sales of \$1,826,223.16. The auditor then divided unsubstantiated nontaxable sales by total sales to calculate a disallowance percentage of 58.75 percent. She applied this percentage to total sales to calculate additional taxable sales of \$1,826,297.17, with a tax due on this amount of \$136,972.29.

The auditor also conducted a test period audit of Wayside's expense purchases. Mr. LaMonica informed the auditor that it would not be possible to provide purchase invoices for the entire audit period. After some discussion with him, the auditor selected a one-month test period of June 1987. She examined two accounts, vehicle repairs and general repairs and maintenance (it would appear that these accounts appeared in Wayside's general ledger). She requested invoices showing each purchase posted to these accounts for the test period. Total purchases for the test period in the category of repairs amounted to \$11,455.85. Invoices established tax was paid on purchases in the amount of \$6,226.75. The auditor divided total purchases for the test period by tax paid purchases to calculate an error rate of 45.6 percent. This error rate was applied to total repair purchases for the audit period of \$305,451.81 to determine purchases subject to tax of \$139,286.03 with sales tax due of \$10,446.45. The same procedure was followed for purchases in the repair and maintenance category to determine purchases subject to tax of \$55,485.52 with sales tax due on that amount of \$4,161.41.

In the category of fixed assets, the auditor performed a detailed review of each asset acquired during the audit period and the period September 1, 1988 through November 30, 1988. These included trash containers, trucks, trailers, and leasehold improvements. Total asset purchases for the audit period were determined to be \$857,017.75. The auditor was able to determine that purchases in the amount of \$514,598.06 were either exempt from taxation or tax

paid. She determined that no sales tax was paid on the remainder of the purchases in the amount of \$340,089.69.¹

The results of the audit performed are as follows:

<u>Amount</u>	<u>Tax Due</u>	
Additional taxable sales	\$1,826,297.17	\$136,972.28
Expense purchases	194,771.55	14,607.86
Fixed asset purchases	<u>340,089.69</u>	<u>25,506.72</u>
Totals	\$2,361,158.41	\$177,086.86

On audit, the Division was informed by Mr. LaMonica that the corporate officers of Wayside are Franco Rotondo and Josephine Rotondo, husband and wife.

Following a conciliation conference, the Division issued conciliation orders reducing the tax assessed to \$163,155.45. The conferee found that the Division failed to request Wayside's books and records for the period September 1, 1988 through November 30, 1988 and cancelled tax assessed in the areas of additional taxable sales and recurring expense purchases for that period. The record shows that detailed records of fixed asset purchases were examined for the last quarter of the assessment period.

Wayside was incorporated by Franco Rotondo in 1980. At that time, he was the corporation's sole officer and shareholder. Sometime in late 1986 or 1987 Mr. Rotondo was convicted of a felony in connection with an investigation conducted by the Internal Revenue Service. As a result of his conviction, certain municipalities refused to continue employing Wayside. This was a serious loss, since the municipalities accounted for approximately 50 percent of Wayside's total receipts at that time. In order to retain the business of the municipalities, Franco Rotondo resigned as an officer and director of Wayside effective October 22, 1986. Josephine Rotondo was appointed as president of the corporation and was listed as a signatory on a corporate bank account. Apparently, documents were filed with certain

¹The Division offered in evidence schedules showing each individual purchase in issue and the auditor's determination with regard to tax due on that purchase.

municipalities reporting the changes in Mr. and Mrs. Rotondo's status.

Mr. Rotondo continued to operate Wayside's business as general manager, hiring and firing employees, managing and supervising the day-to-day work of the corporation, overseeing the corporation's finances and generally controlling all of the business and financial affairs of Wayside. Mr. Rotondo began signing Josephine Rotondo's signature to any document that he believed required the signature of a corporate officer. He continued to sign corporate checks. Sales tax returns filed by Wayside for the period December 1, 1985 through August 31, 1987 bear the signature of Franco Rotondo and were signed by Mr. Rotondo.

Mrs. Rotondo was a full-time homemaker and mother. She had no involvement in running the business of Wayside, did not hire or fire employees, did not maintain books and records and only occasionally executed documents on behalf of the corporation, always at the direction of her husband or Wayside's accountant.

On New York State corporation franchise tax reports and related documents filed by Wayside for the years 1984, 1985 and 1986, Franco Rotondo is listed as president and sole shareholder of Wayside. Franco Rotondo signed the corporation tax reports for those years. Josephine Rotondo signed a form CT-6 (Election by a Small Business Corporation for Personal Income Tax and Corporate Franchise Tax Purposes) dated December 18, 1986. She is listed on the form as an officer and sole shareholder of Wayside. Wayside filed S corporation information reports for 1987 and 1988 with attached Federal schedules, showing Josephine Rotondo as the sole shareholder of that corporation.

Josephine Rotondo testified that she signed her name to the CT-6 form and the S Corporation Information Return for 1988. Franco Rotondo signed his wife's name to the S Corporation Information Return for 1987. He also signed his wife's name to the powers of attorney authorizing Stewart Buxbaum to represent Wayside and Josephine Rotondo respectively before the Division of Tax Appeals. Both Franco and Josephine Rotondo testified that Mrs. Rotondo authorized her husband to sign her name on all documents which required her signature.

Franco Rotondo described Wayside's recordkeeping procedures for the audit years. Wayside employed two kinds of invoices or billing records. One was in the form of a triplicate receipt for services rendered. The receipt did not include a space to enter the amount of the charge for such services. It was used in connection with Wayside's dumpster service. Wayside rented dumpsters to construction contractors, delivering empty dumpsters to the construction site, picking up full dumpsters and disposing of the debris. When a dumpster was delivered to a site, a copy of the receipt was given to the customer and a copy was retained by Wayside (the disposition of the third copy is not known). Franco Rotondo testified that Wayside did not collect sales tax on charges for these services, because the services were deemed to be a part of the overall service of providing a capital improvement. Mr. Rotondo testified that the receipts for these sales were discarded when they became too numerous to store in a drawer.

Wayside kept track of its residential accounts on preprinted index cards. There was a card for each customer with a space for the customer's name, phone number, the rate charged, and monthly payments. Residential customers received a monthly billing that included sales tax. Tax-exempt organizations such as churches and cemeteries were treated as residential accounts for recordkeeping purposes. Mr. Rotondo stated that the index cards showing payments by each customer were normally retained for years; however, the cards were subpoenaed in connection with the criminal investigation that led to Mr. Rotondo's felony conviction.

Mr. Rotondo estimated the amount of sales tax collected on the residential accounts and deposited this amount in a special account from which sales taxes were paid. Other monies collected from the residential and construction accounts were deposited in a different Wayside account. Mr. Rotondo testified that Wayside did not maintain a general ledger or sales journal. According to Mr. Rotondo, Wayside's bank statements were Wayside's only records of receipts and expenses.

Mr. Rotondo testified that Wayside paid no sales tax on its purchases of roll-off dumpsters, containers, a tractor trailer and other equipment used to remove construction debris

and in connection with services rendered to tax-exempt organizations such as churches. He stated that he was advised that no tax was due on these purchases.

At the commencement of the hearing in this matter, petitioners' attorney, Robert Plautz, stated that as a result of a misunderstanding Josephine Rotondo was not present to offer testimony. He stated that petitioners wanted to offer an affidavit subsequent to hearing with regard to her liability for taxes due from Wayside. The Division's attorney then made an objection stating as follows:

"Division of Taxation objects to only an affidavit from Mrs. Rotondo on her status. I believe it would be more appropriate for her to be here to testify and give the opportunity to the Division of Tax to cross-examine on what she is saying in the testimony. This is a key issue for her and I don't think it should be resolved by just an Affidavit. We would like to have her present in the courtroom." (Tr., pp. 8-9.)

The Administrative Law Judge responded to the Division's objection as follows:

"Mr. Plautz, I can accept an affidavit and really the rules of the Tax Appeals Tribunal allow for affidavits; but you're going to have to understand that the weight that would be given to an affidavit may be somewhat less than actual testimony under oath that is subject to cross-examination. Now I don't know exactly what you intend to put into the affidavit and whether you can prove much of it without her here. This is your case and you will have to weigh the effect of doing it through affidavits. This is your call to make though." (Tr., p. 9.)

At the end of the first day of hearing, Mr. Plautz was given approximately two weeks to decide whether petitioners would submit an affidavit, request a continuance to offer Mrs. Rotondo's testimony or seek the Division's agreement to take a deposition from Mrs. Rotondo.

By letter dated September 30, 1992, petitioners requested that the hearing be continued to a day in February 1993 to allow Mrs. Rotondo to testify. Petitioners also proposed to offer the testimony of Vito LaMonica, Wayside's accountant, at the continued hearing. In a letter dated October 6, 1992, the Administrative Law Judge informed the parties that a continued hearing would be scheduled for February 3, 1993.

The Division brought a motion, dated November 2, 1992, for an order dismissing the petition in this matter as it applies to Wayside and Josephine Rotondo. The Division claimed that a valid petition had not been filed by these petitioners and, therefore, that the Division of Tax Appeals lacks subject matter jurisdiction over the petition of Wayside and Josephine

Rotondo. The basis for this claim was Mr. Rotondo's testimony that he had signed his wife's name to the powers of attorney appointing Stewart Buxbaum to represent Wayside and Josephine Rotondo. The Division argued that the powers of attorney are invalid because they were not signed by Mrs. Rotondo and that the petition and request for a conciliation conference are likewise invalid because they were signed by Mr. Buxbaum.

The Division also requested that determinations on default be issued against Wayside and Josephine Rotondo. The basis for this motion was Mr. Rotondo's testimony that he signed the powers of attorney appointing Mr. Plautz to represent Wayside and Josephine Rotondo before the Division of Tax Appeals. The Division argued that Mr. Plautz did not have the authority to represent either Wayside or Mrs. Rotondo and, as a result, that they failed to appear at the hearing held on September 14, 1992.

The Division also objected to allowing Mr. LaMonica to testify since Mr. Plautz did not request a continuance for that purpose at the hearing and because "testimony by Mr. LaMonica at this time would require the Department to incur the additional time and expense of bringing the auditor back for the continued hearing" (Letter to Corigliano, J., Administrative Law Judge, November 2, 1992).

In a letter dated November 5, 1992, the Administrative Law Judge informed the parties that she was treating the Division's motions as a motion to amend the answer and granting that motion. She stated that all of the issues raised in the motions would be addressed in her determination. She also stated that Mr. LaMonica would be allowed to testify at the continuation.

At the continued hearing, petitioners placed an affidavit from Mr. LaMonica in the record. Mrs. Rotondo testified that she gave her husband blanket authority to sign any documents which required her signature. She stated specifically that she gave her husband permission to sign the powers of attorney appointing Mr. Buxbaum and Mr. Plautz to represent Wayside and her. She stated that she signed the form CT-6, and while she could not remember with certainty she thought she signed the form at the request of Wayside's accountant when Mr.

Rotondo was unavailable. Mrs. Rotondo's testimony revealed that she had little knowledge or understanding of Wayside's business or financial affairs. Mr. Rotondo offered direct testimony at the continued hearing. He stated that Mrs. Rotondo was a signatory on Wayside's general business checking account but was not a signatory on the tax account. Checks drawn on the tax account were signed by Franco Rotondo. With his permission, Mrs. Rotondo signed her husband's name to several checks drawn on the tax account but did not sign in her own name.

At the beginning of the continued hearing, the Administrative Law Judge asked the Division's attorney whether a power of attorney from a wife to a husband need be in writing to make that appointment valid. The attorney never directly answered this question stating that there was no proof in the record that a power of attorney of any sort existed from Mrs. Rotondo to Mr. Rotondo. He also stated that he was not prepared at that time to offer decisional authority to support the Division's motion but stated that he "would be happy to include such case law in the brief, if you require" (tr., p. 174). The Administrative Law Judge replied: "If you intend to follow through with this after this hearing today, I would suggest that you do that" (tr., p. 174). Mr. Jarvis did not address the issues raised in the Division's motions in his closing argument. However, Mr. Plautz argued in his closing that the testimony established that Mrs. Rotondo ratified the acts of her husband, including his appointment of Mr. Buxbaum and Mr. Plautz to represent her and Wayside. At that point, the Administrative Law Judge asked Mr. Jarvis whether the Division contended that Mrs. Rotondo did not ratify her husband's acts. He responded:

"At this point in time that will be our position. Obviously, I will review the testimony produced at today's hearing and determine how that affects the arguments I've previously raised and the position we previously took, and see if those arguments and positions are still valid ones or not. If they're not, if we believe those arguments are no longer valid, we will withdraw them at the time we submit a brief." (Tr., p. 216.)

The Administrative Law Judge established a schedule for submission of briefs by the parties as follows: April 2, 1993 for petitioners' brief, May 3, 1993 for the Division's brief and May 17, 1993 for petitioner's reply brief. After that, the following discussion ensued.

Mr. Plautz: "May I be heard on a procedural point? On the briefs, I would assume

that in your brief, Mr. Jarvis, you'll be dealing with the issues you raised in your motions?"

Mr. Jarvis: "That's correct."

Mr. Plautz: "Okay. And I'll be dealing with the answer in my reply."

Judge Corigliano: "I see what you're saying. He's the one who raised it and, therefore, you will answer in your May 17 reply."

Mr. Plautz: "Yes." (Tr., p. 209.)

The Division never submitted a brief; consequently, petitioners did not submit a reply brief addressing the issues raised in the Division's motions.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners seek cancellation of all taxes assessed on the ground that the assessments lack a rational basis. Petitioners concede that Wayside did not provide adequate books and records to the Division on audit, but they contend that the Division failed to show that the audit methodology employed had a rational basis.

Petitioners claim that Josephine Rotondo was not a responsible officer because she had no power or authority to direct payment of sales taxes and did not participate in the running of Wayside's business operations. They also argue that an assessment against an individual must have a rational basis at the time the assessment is issued. The auditor testified that an assessment was issued against Josephine Rotondo because she was identified as an officer of Wayside by Wayside's accountant. Petitioners claim that because corporate officer status is not a sufficient basis in itself to find an individual liable for sales and use taxes under Tax Law §§ 1131(1) and 1133(a) the information received from the accountant does not constitute a rational basis for issuing the assessment against Mrs. Rotondo.

Petitioner Josephine Rotondo seeks an award in the amount of \$1,500.00 and cancellation of the notice of determination issued to her on the ground that she was denied due process of law within the meaning of Tax Law § 2000. According to petitioners, Mrs. Rotondo traveled a distance of more than 200 miles at a cost of approximately \$100.00 to appear at the continued hearing in Troy. Her testimony, direct and cross-examination, lasted approximately

45 minutes. In his brief, petitioners' attorney states:

"At the hearing on September 14, 1992, it was proposed that an affidavit be submitted from Petitioner Josephine Rotondo that would deal with the issue involving Petitioner Josephine Rotondo's alleged 'responsible officer' status within the corporation. (Tr. 8-9). Respondent objected and required that Petitioner Josephine Rotondo to appear [sic] for cross-examination (Tr. 9). Faced with this response, Petitioner Josephine Rotondo appeared at the continued hearing on February 3, 1993." (Petitioner's Brief, p. 14; emphasis added.)

Petitioners assert that the Division's cross-examination of Mrs. Rotondo was a waste of time. They note that her direct testimony was duplicative of the testimony offered by Mr. Rotondo on the first day of hearing and claim that any question asked her by the Division on cross-examination could have been addressed to Mr. Rotondo. Finally, they claim that the Division harassed and abused Mrs. Rotondo by requiring her to travel to Troy, New York to testify.

In its closing argument, the Division argued that in the face of clearly inadequate books and records it made a reasonable effort to estimate Wayside's taxable sales and that petitioners have not shown that the audit method was unreasonable or the results incorrect.

With regard to Mrs. Rotondo's liability for sales taxes due from Wayside, the Division argued that Mr. Rotondo created the perception that Mrs. Rotondo was a responsible officer of Wayside and should not now be allowed to deny her liability for sales tax due from that corporation.

Finally, the Division noted that petitioners offered no evidence to support their request for cancellation of penalties and asked that penalties be sustained.

CONCLUSIONS OF LAW

A. Before addressing the issues raised by petitioners, it is first necessary to dispose of the Division's motions to dismiss the petitions of Wayside and Mrs. Rotondo or, alternatively, to issue default determinations against them. These motions were based on facts adduced at hearing which established that Franco Rotondo signed his wife's name to the powers of attorney appointing Stewart Buxbaum and Robert Plautz to represent Wayside and Josephine Rotondo before the Division of Taxation and the Division of Tax Appeals. Mrs. Rotondo testified that

her husband signed these documents with her permission. The Division's attorney stated that the Division would develop the legal theory underlying its motions and provide legal authority in support of its position in a post-hearing brief. Since no brief was filed, I can only conclude that the Division has abandoned its arguments with respect to these motions. Accordingly, the motions are denied.

B. Pursuant to section 1135(a)(1) of the Tax Law, every person required to collect sales and use taxes is also required to "keep records of every sale . . . and of all amounts paid, charged or due thereon and of the tax payable thereon" Such records must include a true copy of each sales slip, invoice, statement or other memorandum of sale, separately stating the amount of tax due (Tax Law § 1135[a][1]; see also, 20 NYCRR 533.2[b]). The failure to keep the required records may be deemed to establish the incorrectness of the filed sales tax returns (20 NYCRR 533.2[g]). If a return is incorrect or insufficient, the Commissioner of Taxation and Finance is authorized to determine the amount of tax due "from such information as may be available", and to estimate the tax on the basis of external indices if necessary (Tax Law § 1138[a][1]).

To determine the adequacy of a taxpayer's records, the Division must first request and thoroughly examine the taxpayer's books and records for the complete audit period (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, 828, lv denied 71 NY2d 806, 530 NYS2d 109; see also, Matter of Max Service Center, Tax Appeals Tribunal, September 29, 1988). The purpose of the examination is to determine, through verification drawn independently from these records, whether they are adequate for the purpose of verifying the taxpayer's sales tax liability (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41). If the taxpayer's books and records do not provide an adequate basis for determining the tax liability, the Division must select an audit method which results in a reasonable calculation of the taxpayer's sales tax liability (Matter of W. T. Grant Company v. Joseph, 2 NY2d 196, 159 NYS2d 150, 157, cert denied 355 US 869).

In their petition, petitioners claimed that the auditor did not request books and records for

the entire period of the proposed assessment. The record demonstrates that the Division made a written request for all of Wayside's records of sales and purchases for the period September 1, 1985 through August 31, 1988. The Division issued conciliation orders which reduced the total amount of tax assessed against petitioners to \$163,155.45 by cancelling tax assessed for the period September 1, 1988 through November 30, 1988 in the areas of additional taxable sales and recurring expense purchases. Petitioners did not pursue this issue any further in their brief; therefore, I conclude that an adequate request for books and records was made for the assessment period, as modified by the conciliation orders. Since petitioners concede that the records made available on audit were not sufficient for the purpose of verifying petitioners' sales tax liability, the burden was upon petitioners to show that the method of audit or the amount of tax assessed, after modification by the conciliation orders, was erroneous (Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 859, 446 NYS2d 451, 453).

Petitioners contend that the Division's method of estimating nontaxable sales lacks a rational basis. Based primarily upon the opinion of the Tax Appeals Tribunal in Matter of Academy Beer Distributors (Tax Appeals Tribunal, January 21, 1993), petitioners argue that having relied on third-party confirmations to estimate Wayside's nontaxable sales the Division was obliged to introduce all of the confirmation letters into evidence. Petitioners note that the auditor's assertion that Mr. LaMonica sent the confirmation letters to Wayside's customers was shown to be incorrect. They concede that many of the confirmation letters were entered into evidence, but they note that many of those letters were unsigned or undated or did not identify the individual from whom the information was gathered "or the relationship, if any, of that person to the wholesale account" (Petitioners' Brief, p. 6). Petitioners claim that the Division's failure to produce the documents prevented petitioners from verifying the accuracy of the figures which the auditor allegedly took from the letters and also prevented them from independently verifying the amounts through Wayside's customers. Based on all of these facts, petitioners argue that they have established that the audit method lacks a rational basis. Petitioners also argue that it would be erroneous for the Division to rely on the presumption of

Tax Law § 1132(c), stating that such a reliance would be contrary to the Tribunal's holding in Academy Beer.

Tax Law § 1132(c) creates a presumption that all receipts from the sale of property or services mentioned in Tax Law § 1105(a), (b), (c) and (d) are subject to tax until the contrary is established, and it places the burden of proving that any receipt is not taxable on the person required to collect the tax or the customer. However, the Tax Appeals Tribunal has concluded that Tax Law § 1132(c) does not provide an automatic justification for treating all sales as taxable on audit; rather, it has held the proper standard to be applied is whether under all of the circumstances existing at the time of the audit the audit method was reasonably calculated to reflect the taxes due (Matter of Academy Beer Distributors, *supra*; Matter of Bernstein-On-Essex St., Tax Appeals Tribunal, December 3, 1992; Matter of Auriemma, Tax Appeals Tribunal, September 17, 1992).

One of the most important factors to be considered in determining the reasonableness of an audit method is the state of the taxpayer's records at the time of the audit. A vendor of taxable goods and services is under a duty to maintain books and records which would enable the Division on audit to verify taxable and nontaxable sales. The rules and regulations of the Commissioner of Taxation and Finance provide that each sales record must provide sufficient detail to independently determine the taxable status of each sale and the amount of tax due on that sale (20 NYCRR 533.2([b])[2]; *see also*, Matter of Licata v. Chu, 64 NY2d 873, 487 NYS2d 552). 20 NYCRR 533.2(b)(4) states: "Every vendor accepting an exemption certificate must maintain a method of associating a sale made for exempt purposes with the certificate on file."

Here, petitioners did not maintain a sales journal or segregate taxable and nontaxable sales in its general ledger. In addition, petitioners provided no sales invoices to the auditor. Without such records, the auditor could not associate any particular sale with a certificate on file. She could not even be certain of which sales Wayside was claiming were nontaxable. Mr. Rotondo testified that he considered all receipts from Wayside's dumpster service to be nontaxable because the services were provided to contractors who, presumably, were

performing capital improvements. He went on to state that he discarded all receipts from the sale of such services.² Without those receipts, the Division could not determine which portion of Wayside's sales fell into this category of nontaxable sales or verify that the dumpster service was used in the course of performing a capital improvement. Receipts from Wayside's other sales were also unavailable. Under these circumstances, it was not unreasonable for the Division to rely on third-party confirmations to determine Wayside's nontaxable sales.

The facts of this case are distinguishable from the facts of those cases cited by petitioner. In Matter of Academy Beer Distributors (*supra*) the Tribunal treated receipts for which sales invoices were provided differently from sales for which sales invoices were not provided.

The record in that case established that the petitioner provided no sales invoices whatsoever for sales in the amount of \$1,385,021.00. With regard to those sales, the Tribunal held as follows:

"The salient fact here is that petitioners maintained no invoices for the \$1,385,021.00 of sales they asserted were not taxable. The Division accepted the dollar amount of the sales. However, absent the invoices, the Division could not know who was the purchaser and, thus, on audit had no way at all in which to determine the status of these sales as exempt as sales for resale, sales to exempt organizations or as exempt for any other reason, as asserted by petitioners. Under these circumstances, the Division was entitled to rely on the presumption of taxability in section 1132(c) for these sales" (Matter of Academy Beer Distributors, *supra*, citations omitted).

In Matter of Auriemma (*supra*) and Matter of Bernstein-on-Essex St. (*supra*), the Tribunal distinguished between sales claimed to be exempt under a specific provision of the Tax Law which requires the vendor to obtain an exemption certificate (e.g., sales to exempt organizations) and sales claimed to be not subject to tax for which no certificate of exemption is required (e.g., sales of grocery foods). The Tribunal held that the presumption of Tax Law § 1132(c) arises where an exemption certificate is required and is either not obtained or cannot be associated with any particular sale. Where a certificate is not required, the Division is

²The provision of waste removal services to a contractor who uses those services in the course of performing a capital improvement is not subject to the tax imposed under Tax Law § 1105(c)(3) (see, 20 NYCRR 527.7[b], Example 4; Matter of Building Contractors Assoc. v. Tully, 87 AD2d 909, 449 NYS2d 547).

obligated to use an audit method reasonably calculated to reflect the tax due. In this case, the Division was presented with some certificates of tax exemption but had no sales invoices. Since the certificates could not be associated with sales, the auditor could not determine which sales were claimed to be exempt because they were made to tax-exempt organizations, which sales were claimed to be sales for resale, and which sales were claimed to be not subject to tax for some other reason. Even after the Division was made aware that some amount of Wayside's sales were not subject to tax, it was not offered any records of nontaxable sales. Rather than turning a blind eye to the existence of nontaxable sales (cf., Matter of Bernstein-on-Essex, supra [where the auditor based his calculations on the presumption that all sales were taxable although he knew that a certain portion of the taxpayer's sales were nontaxable]), the auditor attempted to contact Wayside's customers to determine the amount of Wayside's nontaxable sales for the audit period. In light of the absence of any verifiable records of sales, the Division's methodology was reasonable.

The circumstances here may profitably be compared with those which existed in Matter of Academy Beer Distributors (supra). As noted, the Tribunal approved the Division's reliance on the presumption of Tax Law § 1132(c) where the petitioners provided no sales invoices. For those sales documented by sales invoices, the Tribunal held that the Division was justified in attempting to verify the amounts on the sales invoices by contacting the petitioners' customers. After scrutinizing the quality and nature of the information obtained from those customers, the Tribunal found that it was not sufficient "to overcome the information derived from petitioners' invoices" (id.). Here, petitioners have offered no evidence at all to overcome the information derived by the Division from third parties. In fact, the only evidence in the record of Wayside's nontaxable sales is the information obtained by the auditor.

In the face of petitioners' failure to produce any evidence to show that any of the third-party confirmations were incorrect, the inadequacies of those confirmations do not form a sufficient basis for cancelling the assessment. The Division offered in evidence a list identifying each vendor who responded to the Division's inquiries, and the total amount of each

vendor's reported purchases from Wayside for the test period. Through the auditor's testimony and the introduction of the workpapers, the Division explained the audit method employed and the results achieved. The auditor was agitated and nervous and obviously unprepared to testify. As noted in the Finding of Facts, she was incorrect when she stated that Mr. LaMonica provided most of the third-party information she relied on in making her calculations. Nonetheless, I found that the record as a whole contained sufficient detail to allow an independent trier of fact to determine that the audit method had a rational basis. The record also showed that copies of at least some of the confirmation letters were in the possession of petitioners and their representatives prior to hearing. This is not a case where the Division failed to place facts in the record to show the external indices relied on to make its calculations (cf., Matter of Fashana, Tax Appeals Tribunal, September 21, 1989). Since the basis for the auditor's calculations were made a part of the record, the burden of proof was upon petitioners to show that those calculations did not accurately reflect its business activity (see, Matter of Pizza Works, Tax Appeals Tribunal, March 21, 1991). Petitioners failed to carry their burden.

C. Tax Law § 1133(a) imposes personal liability for taxes required to be collected under articles 28 and 29 of the Tax Law upon a person required to collect such tax. A person required to collect such tax is defined as:

"any officer, director, or employee of a corporation . . . who as such officer, director or employee is under a duty to act for such corporation . . . in complying with any requirement of [Article 28]" (Tax Law § 1131[1]).

Whether an individual is under a duty to act for a corporation with regard to its tax collection responsibilities so that the individual would have personal liability for the taxes not collected or paid depends on the particular facts of the case (Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564).

The question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of the Tax Appeals Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an

officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; and the individual's economic interests in the corporation (Matter of Martin v. Commr. of Taxation & Fin., 162 AD2d 890, 558 NYS2d 239; Matter of Cohen v. State Tax Commn., *supra*, 513 NYS2d at 565; Matter of Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536, 538, appeal dismissed 69 NY2d 822, 513 NYS2d 1027; Matter of Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862, 865; Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427, 429; Matter of Constantino, Tax Appeals Tribunal, September 27, 1990; Matter of Baumvoll, Tax Appeals Tribunal, November 22, 1989; Matter of D & W Auto Serv. Center, Tax Appeals Tribunal, April 20, 1989).

It is by now an established principle that a corporate officer's failure to exercise actual control over the business and financial activities of the corporation is immaterial if the officer had the legal power and authority to act for the corporation and chose not to do so (see, Matter of Martin v. Commr. of Taxation & Fin., *supra*; Matter of Blodnick v. State Tax Commn., *supra*; Matter of LaPenna, Tax Appeals Tribunal, March 14, 1991; Matter of D & W Auto Serv. Center, *supra*). The facts of this case are very similar to the facts of LaPenna. The petitioners, Constance and Frank LaPenna, agreed to act as the only corporate officers and shareholders of an electrical contracting business operated by their son, James, who was precluded from owning or operating such a business by his membership in a labor union. The LaPennas established that they never performed any duties for the corporation, outside of signing tax returns, and pointed to their son as the person under a duty to collect sales and use taxes on behalf of the corporation. The Tribunal found the LaPennas to be responsible persons within the meaning and intent of Tax Law § 1131(1) "because as the only shareholders and officers of the corporation they clearly had actual authority over the corporation" (Matter of LaPenna, *supra*).

Like the petitioners in LaPenna, Mrs. Rotondo must also be found to be a responsible person for purposes of article 28 of the Tax Law. She was the sole officer and shareholder of

Wayside. Her testimony and that of Mr. Rotondo establish that her willingness to act as a corporate officer and shareholder was necessary in order for Wayside to continue to do business with certain municipalities. She had authority to sign bank checks for Wayside, whether or not she did so. She was listed as the sole shareholder and officer of Wayside on corporate tax returns filed by Wayside, and she signed tax returns on behalf of Wayside. Josephine Rotondo repeatedly testified, as did her husband, that she authorized him to sign documents on behalf of the corporation. Petitioners are attempting to establish that Franco Rotondo is the only person under a duty to act for Wayside in complying with article 28 of the Tax Law. However, more than one person can be held liable as a person under a duty to act for the corporation in collecting tax. Pointing to Franco Rotondo's undisputed control over the day-to-day affairs of the corporation is not enough to establish that Josephine Rotondo is not a responsible officer (see, Matter of Martin v. Commr. of Taxation & Fin., *supra*; Matter of Blodnick v. New York State Tax Commn., *supra*).

D. Although the Division's determination that Josephine Rotondo is a responsible officer of Wayside is sustained, the notices of determination issued to Mrs. Rotondo must be modified to reflect the evidence in the record that shows that she was not an officer or shareholder of Wayside throughout the entire audit period. The exact date on which Mrs. Rotondo assumed corporate office is not in the record. Franco Rotondo resigned from office on October 22, 1986, and Mrs. Rotondo signed a corporation tax document in December 1986. It must be concluded that Mrs. Rotondo assumed her status as a corporate officer and shareholder at about the time Mr. Rotondo resigned, or about October 22, 1986. Accordingly, tax assessed against Mrs. Rotondo for those sales tax quarters ending before September 1, 1986 shall be cancelled.

E. Petitioners presented no evidence to show that Wayside's failure to comply with article 28 was due to reasonable cause and not due to willful neglect (Tax Law § 1145[a][1][i]), and, with the adjustments ordered by the conciliation conferee, the amount of tax Wayside omitted reporting on its returns is still greater than 25 percent of the amount of tax required to be shown (Tax Law § 1145[a][1][vi]). Accordingly, the penalties assessed are sustained.

F. Petitioners' request for damages is baseless. There is no provision in the Tax Law empowering the Division of Tax Appeals to order the Division to pay damages to a taxpayer in any matter. I must add that petitioners' claim that the Division required Mrs. Rotondo to testify is unfounded as demonstrated by the transcript which has been amply quoted in the Findings of Fact.

G. The petition of Wayside Carting, Inc. and Franco Rotondo is denied and the notices of determination and demands for payment of sales and use taxes due, as modified by the conciliation orders dated September 28, 1990, are sustained.

The petition of Josephine Rotondo is granted to the extent indicated in Conclusion of Law "D"; the notices of determination and demands for payment of sales and use taxes due shall be modified in accordance with this conclusion and the conciliation order dated September 28, 1990; and in all other respects, the petition is denied.

DATED: Troy, New York
September 23, 1993

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE